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84-1659

No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1984

STATE OF CONNECTICUT
Petitioner

v.

ALAN H. MARTIN
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

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5 pp

QUESTIONS PRESENTED

1. Whether a state court may use a procedural default rule to enlarge the scope of the Fourth Amendment?

2. Whether the Appellate Court erred in refusing to apply to the facts of this case the good-faith exception to the exclusionary rule, enunciated while this case was pending decision on direct review?

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OPINION BELOW

The opinion of the Connecticut Appellate Court (App. A, infra, 1a-12a) (original opinion), (App. B., infra, 13a-26a) (amended opinion) is reported at 2 Conn. App. 605, 482 A.2d 70 (1984). The decision of the Connecticut Supreme Court denying the State's Petition for Certification to Appeal is reported at 195 Conn. 802, __ A.2d __ (1985).

JURISDICTION

The decision of the Connecticut Supreme Court denying the State's Petition for Certification to Appeal was rendered on February 15, 1985, and notice was mailed to counsel on February 19, 1985.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides: "The Right of the people to be secure in their persons,

houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT

On August 26, 1981, the respondent was arrested and charged with illegal possession of a narcotic substance, in violation of Connecticut General Statutes § 19-481(a) (Rev. to 1981), and with illegal possession of a controlled substance, in violation of Connecticut General Statutes § 19-481(c) (Rev. to 1981). The respondent thereafter moved to suppress certain substances, which the State claimed were cocaine and methaqualone, that had been seized from his automobile at the time of his arrest. Following an evidentiary hearing, the trial court

granted the motion to suppress and dismissed the case, finding that the arrest that led to the seizure of the evidence was not supported by probable cause. App. A, infra, 2a. The Connecticut Appellate Court affirmed the trial court's decision, and the Connecticut Supreme Court denied the State's Petition for Certification to Appeal. App. A, infra.

1. The following facts were found by the trial court or are undisputed by the parties:

On the evening of August 26, 1981, Danbury police officers received an anonymous telephone call informing them that a blue Corvette with out-of-state license plates would be involved in a major cocaine transaction at the Foundry Cafe in about twenty minutes. Two officers left for the cafe shortly thereafter. Ten minutes after they arrived the officers observed a blue Corvette with New Hampshire license plates

enter an illuminated portion of the parking lot adjacent to the cafe. They observed the defendant and a blonde female passenger leave the vehicle and walk through the entrance to the cafe and the other stores located in the same building. App. A, infra, 4a.

Fifteen minutes later, the defendant left the cafe entrance accompanied by a male, who entered the Corvette with him. One of the officers identified the male accompanying the defendant as someone who frequented the cafe, which itself was associated with drug traffic, and who had been convicted of a drug charge eight years earlier. App. A, infra, 4a, 5a.

The defendant then drove the automobile to an unlit area of the lot. The officers, who believed that they then had probable cause to search the vehicle and intended to do so, boxed in the Corvette with two police vehicles. One of the

officers then approached the Corvette and asked the defendant for his driver's license and registration. The officer was unable to see inside the automobile while he stood next to it because its windows were darkly tinted. For his personal protection, the officer opened the driver's door of the vehicle, which activated the interior light and illuminated the passenger compartment. The officer then observed the defendant surreptitiously put a small amber bottle and a small spoon on the floor between his legs. Recognizing from his training that such items are used for carrying and snorting cocaine, the officer placed the defendant under arrest. Upon a search of the vehicle, the officers found a plastic bag containing what the State alleged to be approximately four ounces of cocaine and a paper bag containing $5,950.00. App. A, infra, 5a; T. at 27, 75; App. Ct. R. at 29.

2. The defendant was charged with possession of a narcotic substance and illegal possession of a controlled substance. Prior to trial, he filed a motion to suppress the evidence seized from the vehicle, which, having been granted by the trial court, resulted in a dismissal of the case and an appeal by the State to the Appellate Court.

3. In the Appellate Court's original opinion on appeal it concluded that: (1) the officers' avowed purpose in stopping the vehicle (i.e. to conduct a search) required that probable cause exist prior to the stop;[1] (2) probable cause to believe that the defendant was engaged in the commission

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[1] More precisely, the court stated that, because the trial court had found that "the officers seized [the defendant] and his Corvette with the intention, not to investigate, but to search, and that the request for his license and registration was a pretext," the stop was "not an investigative stop" and, therefore, "must have been based on probable cause in order to be valid." App. A, infra, 8a (original opinion).

of a crime did not exist at the time the vehicle was stopped, rendering the subsequent search invalid under the Fourth Amendment; and (3) the good-faith exception to the exclusionary rule, first announced by this Court while this case was pending decision on appeal,[2] should not affect its decision in this case. App. A, infra, 2a (original opinion). Conn. App. 605, 605 n.2, 612, 616 (original opinion).

4. The State thereafter filed a motion to reargue, in which it claimed, in part, that (1) the Fourth Amendment standard for ascertaining the lawfulness of a search is an objective, and not a subjective one; (2) under that standard, there need have been only reasonable and articulable

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[2] In United States v. Leon, ___ U.S. ___, 104 S. Ct. 3405 (1984) the Supreme Court decided that the exclusionary rule "should be modified so as not to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause."

suspicion of criminal activity to justify the stop of the defendant's vehicle; and (3) the undisputed facts of the case satisfied that standard at the time the vehicle was stopped.

5. The Appellate Court granted the State's motion in part,[3] and amended its opinion by stating that, while the lawfulness of a search and seizure under the Fourth Amendment is "ordinarily" judged by an objective standard, in this case the State's failure to invoke such a standard before the trial court or, initially, on appeal would result in the court's adherence to its original position, that the stop of the vehicle could only be justified on a

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[3] The Appellate Court granted the State's motion to reargue with respect to the following question: "Whether the stop of a vehicle otherwise lawful under the fourth amendment is rendered unlawful as a result of the state of mind of the officer who stopped the vehicle." Nevertheless, the court declined to hear reargument, ordering only rebriefing, and ultimately refused to consider, under an objective standard, whether the Fourth Amendment had been violated in this case.

showing of probable cause. App. B, infra, 21a (amended opinion). Interestingly, the court left undisturbed its conclusion that this was a "close case" on the question of probable cause, and that the officers "may well have [had] reasonable and articulable suspicion that the predicted drug sale was taking place." Id. at 616.

6. The Connecticut Supreme Court denied the State's Petition for Certification to Appeal. State v. Martin, 195 Conn. 802, __ A.2d __ (1985).

REASONS FOR GRANTING THE WRIT

The Appellate Court's conclusion that the State's alleged "procedural default" relieved the court of its obligation to apply the proper Fourth Amendment standard to this automobile search represents a radical departure from longstanding and well-established legal principles. This Court has often held that state courts are

not at liberty to enlarge the scope of any provision of the federal constitution. Yet the Appellate Court in this case has done just that. By holding that the State's failure to identify the "reasonable suspicion" standard for assessing the validity of the search prior to its Motion to Reargue relieved the court of its obligation to apply that standard, the Appellate Court has in effect enlarged the scope of the Fourth Amendment in Connecticut. Nor would the State's so-called "procedural default"[4] be an "adequate" independent state ground upon which the judgment below could rest. Surely, no procedural default rule can be used to excuse a court from applying

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4 The State uses the term "procedural default" because the Appellate Court refused to apply the reasonable suspicion standard in this case on the ground that the State had not identified it before the trial court or in its brief to the Appellate Court. See App. B, infra, ___. The State does not believe, however, that a party's failure to identify controlling law is a "procedural default." Nevertheless, the State has used this term because it accurately reflects the Appellate Court's reasoning.

appropriate constitutional law to a claim raised before it. While advocates should know the law applicable to a claim, their ignorance neither changes the law nor justifies a deliberate departure from it.

Likewise, well-settled principles of law lead to the conclusion that the good-faith exception to the exclusionary rule should be applied to the facts of this case. While the decision of this Court in United States v. Leon, __ U.S. _, 104 S. Ct. 3405 (1984) marked a departure from prior law, it cannot be said that the respondent relied to his detriment upon prior law or that the administration of justice would be adversely affected by application of the exception to cases pending on direct review at the time it was rendered. Moreover, whether Leon should be applied to cases pending on direct review raises a significant question not yet expressly resolved by this Court but

that is sure to be presented in many other cases throughout the country.

1. There is no question that the State, like the trial court, and initially the Appellate Court, assumed that, because of the avowed purpose behind the officers' stop of the respondent's vehicle, probable cause would be required to justify the stop under the Fourth Amendment. That assumption was, of course, erroneous; see Scott v. United States, 436 U.S. 128, 138 (1978), ("the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action"); United States v. Robinson, 414 U.S. 218, 236 (1973); 1 LaFave, Search and Seizure § 3.2(b) (1st ed. 1978); see also, New York v. Quarles, __ U.S. __, 104 S. Ct. 2626, 2632 (1984) ("public safety"

exception to the Miranda requirements applies regardless of the "subjective motivation of the arresting officer"); as the Appellate Court itself later acknowledged. Compare, State v. Martin, App. A, infra, 8a (original opinion) (officers' avowed purpose in making the stop activated higher standard of probable cause) with State v. Martin, App. B, infra, 20a (amended opinion) (Fourth Amendment analysis does not look to the subjective state of mind of police but to whether circumstances, "viewed objectively" justify the action). Nevertheless, the Appellate Court concluded that the State's failure to argue below or before it that the stop could, objectively, be justified upon a showing of less than probable cause precluded it from obtaining reargument and reconsideration of the claim under the proper Fourth Amendment standard. The result is that all of the evidence in a serious narcotics case has been excluded and

a criminal will go free where it is virtually undisputed that, judged by the appropriate standard, no Fourth Amendment violation occurred.

The State does not seek to minimize the importance of state rules of practice, which ordinarily require that claims of law be distinctly raised in the trial court.[5] See Conn. Prac. Bk. § 3063 (Rev. to 1984).[6] But the alleged violation of some

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[5] This case differs from the ordinary one in which a claim is simply not raised and, therefore, not considered at all below. In this case, the trial court and the Appellate Court were confronted with the claim that the defendant's Fourth Amendment rights were violated when he was stopped by the police. To resolve that claim, both courts were obliged to apply Fourth Amendment law to the facts of the case. That responsibility is not enlarged or diminished by the parties' failure to point out what the Fourth Amendment might require.

Nor would this Court's consideration of the claim under the appropriate standard be somehow unfair to the respondent. No party has a vested right in the misapplication of the law.

[6] Even Connecticut rules of practice and the decisions applying them recognize that, in the interests of justice, plain error that would result in a miscarriage of justice should be recognized by the courts. See Conn. Prac. Bk. §§ 3063, 3165; State v. Burke, 182 Conn. 330, 331, 438 A.2d 93 (1980)

state rule of practice that results in the refusal to apply controlling federal law is not ipso facto an adequate independent state ground for sustaining the judgment. That is because it is the function of this Court to decide whether an alleged independent state ground is "adequate," so as to bar federal review. Staub v. City of Baxley, 355 U.S. 313, 318 (1958). Thus, as this Court said in Staub, ". . . the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Id., at 319. The question in the federal forum is whether a state procedural rule serves "a legitimate state interest." Henry v. Mississippi, 379 U.S. 443, 447-48 (1965). See also, id. at 448 n.3, Michigan v. Tyler, 436 U.S. 499, 512 n.7 (1978); Camp v. Arkansas, 404 U.S. 69 (1969) (per

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(state supreme court noticed as plain error the failure of parties and the lower court to recognize controlling statute).

curiam), rev'g and remanding 249 Ark. 1075, 467 S.W.2d 707 (1971).

There can be little doubt that the rule of procedure used to prevent consideration of the State's argument here served no legitimate state interest. That is because no state has a legitimate interest in misapplication of the law. Thus, a party's "procedural default" should not relieve a court from applying federal law to a properly raised federal claim.[7] Such a rule would only perpetrate ignorance and undermine the dignity and constitutional responsibility of the judiciary. Hence, while it is always desirable for parties to identify for the court controlling law on issues presented, no "legitimate state interest" is served by a court blinding its

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[7] If a party seeks to raise a federal claim but fails to comply with reasonable state procedural rules in doing so, there would be no question that adequate independent state grounds would bar federal review. Wainwright v. Sykes, 433 U.S. 72, 86-87 (1976); Henry v. Mississippi, 379 U.S. 443 (1965).

eyes to applicable law simply because it is discovered late in the day. Cf. Wainwright v. Sykes, 433 U.S. 72, 88 (1976) (need to develop factual record for federal claim rendered non-compliance with contemporaneous objection rule a proper ground to preclude federal review). Indeed, any state interest in this context should more properly be identified as the fair and informed resolution of federal claims.

The State does not argue, of course, that a party may fail to articulate a federal claim and that the court would be obliged to discern one simply from the facts of the case. Any such rule would require the court to abandon its judicial role and assume the role of advocate. What the state contends is that, once a litigant has raised a federal claim, it is the court's obligation to apply federal law to the claim.

2. Allowing the Appellate Court's decision to stand would have the effect of

permitting a state court to use an alleged procedural default as a tool for enlarging the scope of constitutional protections. Yet state courts "can neither add to nor subtract from the mandates of the United States Constitution." North Carolina v. Butler, 441 U.S. 369, 376 (1979); Oregon v. Hass, 420 U.S. 714 (1975). Since it is clear that the constitutional validity of the stop in this case would depend on whether it was justified by reasonable and articulable suspicion; Delaware v. Prouse, 440 U.S. 648, 663 (1979); and since it was virtually undisputed that reasonable suspicion existed in this case; State v. Martin, App. B infra, 26a (this was a "close case" on existence of probable cause; officers "may well have [had] reasonable and articulable suspicion that the predicted drug sale was taking place"); allowing the Appellate Court's decision to stand would sanction the exclusion of evidence on

federal grounds in the absence of a Fourth Amendment violation. In a day in which the proper application of the exclusionary rule is costly enough; United States v. Leon, __ U.S. __, 104 S. Ct. 3405, 3413 (1984); it is inconceivable that its misapplication could be countenanced and encouraged.

3. It is also apparent that the reasonable good-faith exception to the exclusionary rule should be applied to cases pending on direct review at the time the decision was announced. The general rule, stated in United States v. Johnson, 457 U.S. 537 (1982), is that a "decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered." Id. at 562. One of the exceptions to this rule is that a rule of criminal procedure that is a clear break with the past is "almost invariably . . . nonretroactive." Id. at 549.

While it is true that the rule of Leon was a clear break with the past, it does not follow that its application to cases pending on direct review is barred. A substantial factor in deciding whether new principles of Fourth Amendment law should be retroactively applied is the impact such an application would have on the reasonable reliance either party may have placed on prior law. See United States v. Sager, 743 F.2d 1261, 1263-64 (8th Cir. 1984) (Leon applied on petition for rehearing to case on direct review through good-faith exception not earlier raised). Where, as in the great majority of the cases, the new principle expanded the rights of criminal defendants, the question to be answered was whether retroactive application of the holding would in effect punish law enforcement officers who had reasonably relied upon prior law. See, Solem v. Stumes, __ U.S.

__, 104 S. Ct. 1338, 1341, 1343-45 (1984); United States v. Johnson, 457 U.S. at 549.

In this case, however, the new rule advances law enforcement interests by restricting application of the exclusionary rule. The question thus becomes whether the respondent could be said to have reasonably relied to his detriment on the absence of a good-faith exception to the exclusionary rule. The question compels the answer. The respondent certainly did not plan the drug transaction in this case in reliance on the exclusionary rule as it existed in 1981; that is especially so since there is no indication that the respondent even anticipated police detection in this case. See United States v. Sager, 743 F.2d at 1264.

It is also clear that the administration of justice would not be adversely affected by retroactive application of the Leon rule. See Solem v. Stumes, 104 S. Ct. at 1343, 1345. Indeed, to apply the exclu-

sionary rule when the reason for the rule, i.e., deterrence of police misconduct, does not exist would only thwart and not advance the administration of justice. United States v. Leon, 104 S. Ct. at 3419 (1984).

Moreover, this Court has strongly suggested that it would take this position by a recent decision in an analogous context. In Massachusetts v. Upton, __ U.S. __, 104 S. Ct. 2085 (1984) (per curiam), this Court applied retroactively the Illinois v. Gates, 462 U.S. 213 (1983) test for probable cause, which is both a break with the past and more favorable to the government. Yet, the opinion in Upton gives no hint that the retroactive application of Gates is anything but appropriate.

Finally, on the day that Leon was decided, the Court vacated and remanded for further consideration in light of Leon several cases then pending before it. United States v. Cassity, __ U.S. __, 104 S.

Ct. 3581 (1984); United States v. Tate, __ U.S. __, 104 S. Ct. 3575 (1984); United States v. Crozier, __ U.S. __, 104 S. ct. 3575 (1984).[8] These summary decisions would appear to be clear support for the proposition that the holding of Leon should be given full effect to cases pending on direct review.[9]

4. Any claim that the record as it now exists in this case is inadequate to decide the good-faith issue is without merit. The Leon rule, as the opinion carefully points out, does not turn on subjective good faith, which would usually be a question of fact that is not appropriate for appellate determination. United States v. Leon, supra, 3420 n.20, 3421 n.23

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[8] In fact, the government's petition for a writ of certiorari in United States v. Cassity, supra, does not even raise the question whether the exclusionary rule should be modified.

[9] Whether the good-faith exception enunciated in Leon would apply to a case involving, not a warrant, but a simple good-faith mistake in the determination of probable cause is a question that would be answered on any remand.

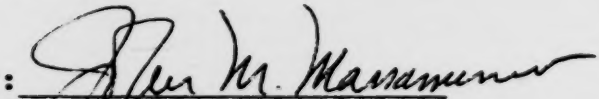
("We emphasize that the standard of reasonableness we adopt is an objective one"; "we also eschew inquiries into the subjective beliefs of law enforcement officers who seize evidence pursuant to a subsequently invalidated warrant"; "our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization"). Because the record in this case is fully adequate for a determination of whether the officers acted with an objectively reasonable good-faith belief that the stop, arrest, and subsequent search were lawful, there is no need for further trial court findings and a remand of the case to the Appellate Court would be appropriate. See United States v. Sager, 743 F.2d at 1265.

CONCLUSION

For the reasons set out above, the Petition for a Writ of Certiorari should be granted and the judgment of the Connecticut Appellate Court reversed or, in the alternative, the case should be remanded to the Appellate Court for further consideration in light of this Court's decision in United States v. Leon, __ U.S. __, 104 S. Ct. 3405 (1984).

Respectfully submitted.

THE STATE OF CONNECTICUT
Petitioner

By: 

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April 1985

No. _____

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OCTOBER TERM, 1984

STATE OF CONNECTICUT
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v.

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Respondent

APPENDIX
OF THE
PETITIONER

STATE OF CONNECTICUT *v.* ALAN H. MARTIN
(2676)

DANNEHY, C.P.J., DUPONT and BORDEN, Js.

The state, on the granting of permission by the trial court, appealed from that court's dismissal with prejudice of the information charging the defendant with the crimes of illegal possession of a narcotic substance and of illegal possession of a controlled substance. Prior to its dismissal of the information, the trial court had granted the defendant's motion to suppress certain substances which had been seized from his car after

a warrantless search of that vehicle. Because, under the totality of the circumstances, the search of the defendant's vehicle was based on less than probable cause, the trial court correctly granted the motion to suppress.

Argued May 3—decision released September 18, 1984

Information charging the defendant with the crimes of possession of a narcotic substance and of possession of a controlled substance, brought to the Superior Court in the judicial district of Danbury, geographical area number three, where the court, *McGrath, J.*, granted the defendant's motion to suppress certain material and dismissed the information, from which the state, with the permission of the trial court, appealed. *No error.*

Richard D. Arconti, assistant state's attorney, for the appellant (state).

Emanuel Margolis, with whom were *Judith Rosenberg* and, on the brief, *Tracy A. Saxe*, for the appellee (defendant).

BORDEN, J. This is an appeal[1] by the state taken with the permission of the trial court, pursuant to General Statutes § 54-96 and Practice Book § 819, from the judgment of the court dismissing the information with prejudice, following the granting of the defendant's motion to suppress. We find no error.[2]

[1] This appeal, originally filed in the Supreme Court, was transferred to this court. Public Acts, Spec. Sess., June, 1983, No. 83-29, § 2 (c).

[2] While this case was on appeal to this court, the United States Supreme Court held that the exclusionary rule, as effected by a motion to suppress such as is involved here, "should be modified so as not to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." *United States* v. *Leon*, U.S. (52 U.S.L.W. 5155, July 5, 1984); *Massachusetts* v. *Sheppard*, U.S. (52 U.S.L.W. 5177, July 5, 1984). This case involves not a search pursuant to a search warrant but a warrantless search, which neither *United States* v. *Leon*, supra, nor *Massachusetts* v. *Sheppard*, supra, addresses. Moreover, the state did not claim

The defendant was charged in an information with illegal possession of a narcotic substance in violation of then General Statutes (Rev. to 1981) § 19-481 (a), now General Statutes § 21a-279 (a), and with illegal possession of a controlled substance in violation of then General Statutes (Rev. to 1981) § 19-481 (c), now General Statutes § 21a-279 (c). He moved to suppress certain substances which the state claimed were cocaine and methaqualone and which had been seized from his car after a warrantless search.

In a comprehensive memorandum of decision, the trial court found the following facts. On August 26, 1981, at approximately 10:30 p.m., Lieutenant Dennis Cooney, the desk officer of the Danbury police department, answered a telephone call and was told by the caller that "there is a blue Corvette out-of-state plate that will be going to the Foundry in about twenty minutes to deal in a large amount of cocaine." The caller, whose voice was unknown to Cooney, did not identify himself. Cooney put out a radio call requesting Detective John Merullo to telephone him.

Merullo had been a member of the Danbury police department for thirteen and one-half years, had worked with the special investigative unit (SIU) of the department involved in narcotics investigations, and had been assigned for the past year to the statewide narcotics task force. Merullo telephoned Cooney from a telephone located at the rear of the headquarters. Cooney told him of the caller's message. Merullo, accompanied by Detective William Hull, used his personal vehicle to

in the trial court a good faith exception to the exclusionary rule for this warrantless search, as it could have. Cf. *United States* v. *Leon*, supra. Thus, there was no occasion for the trial court to make such an initial determination. Nor did the state claim such an exception in this court. Under these circumstances, we decide this case on the basis of what we understand to be the current state of constitutional law, which is that the exclusionary rule applies to warrantless searches.

drive to the Foundry Cafe, which took about five minutes. Upon arriving, Merullo checked the parking lot for a blue Corvette and found none. He parked his vehicle so that he could observe the cafe and the entrance to the parking lot.

Approximately ten minutes later, he saw a blue Corvette with New Hampshire license plates enter the lot and park near two flood lights which were attached to the cafe building and which were about ten feet from a covered walkway. The walkway was the entrance to the cafe and to stores located on the second floor. The area in which the Corvette was parked was well lit. Merullo telephoned the department to check the ownership of the Corvette[3] and to determine if there were any outstanding warrants on it. He also asked Cooney to contact Sargeant James McNamara and Detective Harold Chapman of SIU.

Merullo saw two people leave the Corvette: the operator, a tall white male, later identified as the defendant, and the passenger, a tall white blonde female. They both entered the covered walkway. Merullo assumed they were going to the cafe. Fifteen minutes later the defendant left the walkway accompanied by another male, and they both entered the Corvette. Merullo recognized the other male as Dominic Cristello. At that point there was nothing suspicious about their behavior. The Corvette had tinted windows which prohibited seeing into its interior. A few minutes later, the Corvette was driven to another area where it parked. This was an unlighted area, and Merullo had to move his vehicle in order to keep the Corvette in view. Merullo did not know the operator of the Corvette but he knew, from conversations that he had had with fellow police officers discussing the cafe and drug traffic and from

[3] The court did not specifically find that the Corvette was owned by the defendant, but our examination of the transcript indicates that it was undisputed that Merullo's check disclosed that to be the case.

having reviewed Cristello's police file, that Cristello frequented the cafe and had been convicted of a drug charge eight years before.

McNamara and Chapman arrived. Merullo explained everything that had occurred up to the time of their arrival. He told McNamara that he believed that he had probable cause to search the Corvette, and that he intended to do so. It was agreed that McNamara would drive his vehicle to the area where the Corvette was parked. Merullo drove his vehicle and parked directly behind the Corvette; McNamara stopped his vehicle in front of the Corvette so that it was boxed in. Merullo immediately left his vehicle and went to the Corvette to search it. He approached the operator's side, badge in hand, and identified himself as a police officer. He requested that the window be rolled down and it was rolled down partially. He asked the operator, who was the defendant, for his license and registration. Because he could not see into the vehicle due to the tinted glass, for his own protection he opened the door of the Corvette. Upon his doing so, the interior light went on. Merullo stood by the door and saw the defendant trying to find his registration. He also saw the defendant putting a small amber bottle and a small spoon on the floor between his legs. Merullo knew that such a bottle and spoon were commonly used for carrying and snorting cocaine. Merullo told the defendant that he was under arrest. The officers searched the Corvette for five minutes, and found in the back an overnight bag containing a plastic bag of cocaine and a paper bag containing money.

The court specifically found that Merullo's approach to the Corvette was not for purposes of investigation but was for the purpose for searching the vehicle; that the defendant was seized, within the meaning of the fourth and fourteenth amendments to the United States constitution, when the police boxed in the Corvette and

approached it with the intent to search it; and that the request for the defendant's license and registration was pretextual.

The memorandum of decision of the trial court, which was filed on June 1, 1983, analyzed the search and seizure here under the then familiar principles of *Spinelli* v. *United States,* 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), and *Aguilar* v. *Texas,* 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). Those principles had been understood to require a reviewing court to gauge the reliability of information given by an informant according to a two-pronged test analyzing (1) the basis of the informant's knowledge—the means by which he acquired his information, and (2) the underlying facts establishing either his general veracity or his reliability in the particular case. See *Illinois* v. *Gates,* U.S. , 103 S. Ct. 2317, 2327, 76 L. Ed. 2d 527 (1983). Beginning with this analysis, which was the proper starting point at that time, the court concluded that the informant's tip was unreliable and "therefore [was] to be treated as if it never existed," and further concluded that the seizure was without probable cause. The court granted the motion to suppress the items seized from the Corvette, namely the amber bottle and its contents, the spoon, the overnight bag and its contents, and the paper bag and its contents.

On June 8, 1983, the United States Supreme Court decided *Illinois* v. *Gates,* supra, in which it abandoned the *Aguilar-Spinelli* test in favor of a determination of probable cause based on the totality of the circumstances.[4] Both parties to this appeal agree, as do we, that the test of *Illinois* v. *Gates,* supra, must be applied to the facts of this case.

[4] Subsequently, the United States Supreme Court made it even more clear that in *Gates* it "did not merely refine or qualify the 'two-pronged test.' We rejected it as hypertechnical and divorced from 'the factual and practical considerations of everyday life on which reasonable and prudent men,

We believe that the trial court went too far in saying that it must completely disregard the anonymous tip. The fact of the tip, the degree to which it contained details and the degree to which those details were corroborated were part of the totality of the circumstances test which a court must use in passing on a claim of probable cause. Id. "While a conscientious assessment of the basis for crediting such tips is required by the Fourth Amendment, a standard that leaves virtually no place for anonymous citizen informants is not." Id., 2332. Applying the totality of the circumstances test here, we conclude nonetheless that the trial court was correct in granting the motion to suppress.

The court found that the defendant was "seized," in constitutional parlance, when the officers boxed in the Corvette with their vehicles and approached it with the intent to search. A person is seized when, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *State* v. *Ostroski,* 186 Conn. 287, 291–92, 440 A.2d 984, cert. denied, 459 U.S. 878, 103 S. Ct. 173, 74 L. Ed. 2d 142 (1982), quoting *United States* v. *Mendenhall,* 446 U.S. 544, 553–54, 100 S. Ct. 1870, 64 L. Ed. 2d 497, reh. denied, 448 U.S. 908, 100 S. Ct. 3051, 65 L. Ed. 2d 1138 (1980); *Florida* v. *Royer,* U.S. , 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). "Whether there has been such a seizure in an individual case is a question of fact." *State* v. *Ostroski,* supra, 292. "[S]topping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the fourth and fourteenth] Amendments, even though the purpose of the stop is limited and the resulting deten-

not legal technicians, act.' . . . Our statement on that score was explicit. '[W]e conclude that it is wiser to abandon the "two-pronged test" established by our decisions in Aguilar and Spinelli. In its place we reaffirm the totality of the circumstances analysis that traditionally has informed probable cause determinations.' " *Massachusetts* v. *Upton,* U.S. (52 U.S.L.W. 3822, 3823, May 15, 1984) (per curiam).

tion quite brief." *Delaware* v. *Prouse,* 440 U.S. 648, 653, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979). The court was correct in its factual determination of when the defendant was seized.

It is true that under some circumstances a seizure of an automobile and its occupants may permissibly take place on less than probable cause, such as where there is an investigative stop based on reasonable and articulable suspicion. See, e.g., *Delaware* v. *Prouse,* supra; *State* v. *Januszewski,* 182 Conn. 142, 438 A.2d 679 (1980), cert. denied, 453 U.S. 922, 101 S. Ct. 3159, 69 L. Ed. 2d 1005 (1981). Here, however, the trial court specifically found that when the defendant reentered the Corvette with Cristello there was nothing suspicious about his behavior, that the officers seized him and his Corvette with the intention, not to investigate, but to search, and that the request for his license and registration was a pretext. Thus, this was not an investigative stop. Under these circumstances, the seizure must have been based on probable cause in order to be valid.

Although *Illinois* v. *Gates,* supra, involved a search and seizure pursuant to a warrant, as did *Aguilar* and *Spinelli,* the same standards of probable cause apply to a warrantless search and seizure. See, e.g., *United States* v. *Smith,* 598 F.2d 936, 937 n.2 (5th Cir. 1979).[5] Probable cause deals " 'with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Illinois* v.

[5] Of course, where the search and seizure are pursuant to a warrant, a more "deferential standard of review is appropriate to further the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." *Massachusetts* v. *Upton,* U.S. (52 U.S.L.W. 3822, 3823, May 15, 1984) (per curiam); see also *State* v. *Zindros,* 189 Conn. 228, 253-54, 456 A.2d 288 (1983), cert. denied, U.S. , 104 S. Ct. 1014, 79 L. Ed. 2d 244 (1984).

Gates, supra, 2328. "Probable cause means more than mere suspicion. There must be facts and circumstances within the officer's knowledge, and of which he has trustworthy information, sufficient to justify the belief of a reasonable person that an offense has been or is being committed. . . . There is often a fine line between mere suspicion and probable cause, and '[t]hat line necessarily must be drawn by an act of judgment formed in the light of the particular situation and with account taken of all the circumstances.' " *State* v. *Penland,* 174 Conn. 153, 155–56, 384 A.2d 356, cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978). In the context of a search, there must be probable cause to believe that the material to be seized is connected with criminal activity or will assist in a particular apprehension or conviction, and that the material will be found in the place to be searched. *State* v. *DeChamplain,* 179 Conn. 522, 528–29, 427 A.2d 1338 (1980). Of particular significance here is the reminder of the United States Supreme Court: " 'The process [of determining probable cause] does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Illinois* v. *Gates,* supra, 2328, quoting *United States* v. *Cortez,* 449 U.S. 411, 418, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981).

Applying this test to the seizure which occurred here, we conclude that it was based on less than probable cause. While the informant's tip was a permissible starting point, it lacks sufficient detail and it was not followed by sufficient corroborative behavior to raise

the totality of the circumstances from the level of suspicion to the level of probable cause. Cf. *Illinois* v. *Gates,* supra.

The state seeks to support this search by pointing to certain circumstances concerning which Merullo testified, but which the court did not find as facts. This evidence is that Cristello was known as a narcotics user and dealer; that the police were aware of ongoing drug activity at the cafe; that drug transactions commonly take place in the area of bars and nightclubs; that the dark tinted windows of the Corvette are the type often used in drug transactions; and that the area to which the Corvette was moved was secluded. We need not decide whether this evidence, if credited by the trial court, taken together with the other facts which the court did find, would have supplied a sufficient underpinning for this search. Suffice it to say that the court issued a factually detailed memorandum of decision which did not refer to this evidence. When the court rules on a motion to suppress without detailing the facts supporting its decision, an appellate court may look to the evidence produced in support of the ruling. See, e.g., *State* v. *Jones,* 193 Conn. 70, 475 A.2d 1087 (1984). But where, as here, the trial court performs its judicial function conscientiously by detailing the facts which the state has established, we are not free to add facts which are not found and which are not undisputed. See *State* v. *Perez,* 181 Conn. 299, 302–303, 435 A.2d 334 (1980). We thus address this search shorn of those "facts" which the state seeks to add.

The state concedes in its brief that the arrival of the Corvette at the predicted time and place was insufficient to establish probable cause. It argues, however, that what took place thereafter supplied sufficient corroboration of the tip to establish probable cause under *Illinois* v. *Gates,* supra. We disagree.

We note that although *Gates* abandoned the rigid *Aguilar-Spinelli* test to be applied to informer's tips, it specifically retained the process of examining, in the context of the totality of the circumstances, the "informant's 'veracity,' 'reliability' and 'basis of knowledge' [as] all highly relevant in determining the value of his report." Id., 2327. We note also that *Gates* focused its analysis on three basic types of informer's tips: those from a particular informant known for the reliability of his predictions of certain types of criminality in a certain area; those from an unquestionably honest citizen who comes forward with a report of criminal activity, which if fabricated would subject him to criminal liability; and those from an informant who, although his motives may be open to question, supplies an explicit and detailed description of alleged wrongdoing, along with an indication that the event was observed first-hand, thus entitling the tip to greater weight than might otherwise be the case. Id., 2329–30.

It is this third type which provides the starting point of our analysis in this case; for, under *Gates,* where the tip involves a prediction of future activity, it is not necessary that the tipster himself indicate a basis of first-hand knowledge, as long as the detail of the tip indicates a "fair probability" that the information came from the target of the tip or from someone whom the target trusted, and as long as that probability was provided by corroboration of the "major portions" of the tipster's predictions. Id., 2336.

Here, the amount of the detail in the tip, which Merullo's investigation corroborated, was moderate, to say the most. It amounted to the color and make of an automobile with out-of-state plates, and the estimated time and place of its arrival. Compare, e.g., the amount of detail supplied by the anonymous letter-writer in *Illinois* v. *Gates,* supra; and the amount of detail supplied by the known informant in *Draper* v. *United*

States, 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959), described by the court in *Gates* as "the classic case on the value of corroborative efforts of police officials." Id., 2334. What followed the defendant's arrival at the cafe at the generally predicted time and in a vehicle which fit the general description given in the tip was that the defendant left the vehicle with one person, returned with another who had an eight year old drug conviction, and moved the vehicle from an illuminated area to an unilluminated area. While this activity may well have given Merullo reasonable and articulable suspicion that the predicted drug sale was taking place, and while this is a close case, we cannot say that the amount of the detail originally supplied was enough, and that it was sufficiently corroborated by further detail, so as to establish a fair probability that the anonymous tipster here had obtained his information either from the defendant or from someone whom the defendant trusted. Cf. *Illinois* v. *Gates,* supra; *Massachusetts* v. *Upton,* supra. We are mindful that " '[b]ecause an informant is right about some things, he is more probably right about other facts . . . .' " *Illinois* v. *Gates,* supra, 2335, quoting *United States* v. *Spinelli,* supra, 427. Unlike *Gates,* however, in which the anonymous letter "contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted"; *Illinois* v. *Gates,* supra, 2335; the nature of the tip and its corroboration here were insufficient to afford " 'a substantial basis for crediting the' " tip. Id. Thus, we conclude that the search was based on less than probable cause.

There is no error.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ALAN H. MARTIN
(2676)

DANNEHY, C.P.J., DUPONT and BORDEN, Js.

The state, on the granting of permission by the trial court, appealed from that court's dismissal with prejudice of the information charging the defendant with the crimes of illegal possession of a narcotic substance and of illegal possession of a controlled substance. Prior to its dismissal of the information, the trial court had granted the defendant's motion to suppress certain substances which had been seized from his car after

a warrantless search of that vehicle. Because, under the totality of the circumstances, the search of the defendant's vehicle was based on less than probable cause, the trial court correctly granted the motion to suppress.

Argued May 3—decision released September 18, 1984

Information charging the defendant with the crimes of possession of a narcotic substance and of possession of a controlled substance, brought to the Superior Court in the judicial district of Danbury, geographical area number three, where the court, *McGrath, J.*, granted the defendant's motion to suppress certain material and dismissed the information, from which the state, with the permission of the trial court, appealed. *No error.*

Richard D. Arconti, assistant state's attorney, for the appellant (state).

Emanuel Margolis, with whom were *Judith Rosenberg* and, on the brief, *Tracy A. Saxe,* for the appellee (defendant).

BORDEN, J. This is an appeal[1] by the state taken with the permission of the trial court, pursuant to General Statutes § 54-96 and Practice Book § 819, from the judgment of the court dismissing the information with prejudice, following the granting of the defendant's motion to suppress. We find no error.[2]

[1] This appeal, originally filed in the Supreme Court, was transferred to this court. Public Acts, Spec. Sess., June, 1983, No. 83-29, § 2 (c).

[2] While this case was on appeal to this court, the United States Supreme Court held that the exclusionary rule, as effected by a motion to suppress such as is involved here, "should be modified so as not to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." *United States* v. *Leon,* U.S. (52 U.S.L.W. 5155, July 5, 1984); *Massachusetts* v. *Sheppard,* U.S. (52 U.S.L.W. 5177, July 5, 1984). This case involves not a search pursuant to a search warrant but a warrantless search, which neither *United States* v. *Leon,* supra, nor *Massachusetts* v. *Sheppard,* supra, addresses. Moreover, the state did not claim

The defendant was charged in an information with illegal possession of a narcotic substance in violation of then General Statutes (Rev. to 1981) § 19-481 (a), now General Statutes § 21a-279 (a), and with illegal possession of a controlled substance in violation of then General Statutes (Rev. to 1981) § 19-481 (c), now General Statutes § 21a-279 (c). He moved to suppress certain substances which the state claimed were cocaine and methaqualone and which had been seized from his car after a warrantless search.

In a comprehensive memorandum of decision, the trial court found the following facts. On August 26, 1981, at approximately 10:30 p.m., Lieutenant Dennis Cooney, the desk officer of the Danbury police department, answered a telephone call and was told by the caller that "there is a blue Corvette out-of-state plate that will be going to the Foundry in about twenty minutes to deal in a large amount of cocaine." The caller, whose voice was unknown to Cooney, did not identify himself. Cooney put out a radio call requesting Detective John Merullo to telephone him.

Merullo had been a member of the Danbury police department for thirteen and one-half years, had worked with the special investigative unit (SIU) of the department involved in narcotics investigations, and had been assigned for the past year to the statewide narcotics task force. Merullo telephoned Cooney from a telephone located at the rear of the headquarters. Cooney told him of the caller's message. Merullo, accompanied by Detective William Hull, used his personal vehicle to

in the trial court a good faith exception to the exclusionary rule for this warrantless search, as it could have. Cf. *United States* v. *Leon*, supra. Thus, there was no occasion for the trial court to make such an initial determination. Nor did the state claim such an exception in this court. Under these circumstances, we decide this case on the basis of what we understand to be the current state of constitutional law, which is that the exclusionary rule applies to warrantless searches.

drive to the Foundry Cafe, which took about five minutes. Upon arriving, Merullo checked the parking lot for a blue Corvette and found none. He parked his vehicle so that he could observe the cafe and the entrance to the parking lot.

Approximately ten minutes later, he saw a blue Corvette with New Hampshire license plates enter the lot and park near two flood lights which were attached to the cafe building and which were about ten feet from a covered walkway. The walkway was the entrance to the cafe and to stores located on the second floor. The area in which the Corvette was parked was well lit. Merullo telephoned the department to check the ownership of the Corvette[3] and to determine if there were any outstanding warrants on it. He also asked Cooney to contact Sargeant James McNamara and Detective Harold Chapman of SIU.

Merullo saw two people leave the Corvette: the operator, a tall white male, later identified as the defendant, and the passenger, a tall white blonde female. They both entered the covered walkway. Merullo assumed they were going to the cafe. Fifteen minutes later the defendant left the walkway accompanied by another male, and they both entered the Corvette. Merullo recognized the other male as Dominic Cristello. At that point there was nothing suspicious about their behavior. The Corvette had tinted windows which prohibited seeing into its interior. A few minutes later, the Corvette was driven to another area where it parked. This was an unlighted area, and Merullo had to move his vehicle in order to keep the Corvette in view. Merullo did not know the operator of the Corvette but he knew, from conversations that he had had with fellow police officers discussing the cafe and drug traffic and from

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having reviewed Cristello's police file, that Cristello frequented the cafe and had been convicted of a drug charge eight years before.

McNamara and Chapman arrived. Merullo explained everything that had occurred up to the time of their arrival. He told McNamara that he believed that he had probable cause to search the Corvette, and that he intended to do so. It was agreed that McNamara would drive his vehicle to the area where the Corvette was parked. Merullo drove his vehicle and parked directly behind the Corvette; McNamara stopped his vehicle in front of the Corvette so that it was boxed in. Merullo immediately left his vehicle and went to the Corvette to search it. He approached the operator's side, badge in hand, and identified himself as a police officer. He requested that the window be rolled down and it was rolled down partially. He asked the operator, who was the defendant, for his license and registration. Because he could not see into the vehicle due to the tinted glass, for his own protection he opened the door of the Corvette. Upon his doing so, the interior light went on. Merullo stood by the door and saw the defendant trying to find his registration. He also saw the defendant putting a small amber bottle and a small spoon on the floor between his legs. Merullo knew that such a bottle and spoon were commonly used for carrying and snorting cocaine. Merullo told the defendant that he was under arrest. The officers searched the Corvette for five minutes, and found in the back an overnight bag containing a plastic bag of cocaine and a paper bag containing money.

The court specifically found that Merullo's approach to the Corvette was not for purposes of investigation but was for the purpose for searching the vehicle; that the defendant was seized, within the meaning of the fourth and fourteenth amendments to the United States constitution, when the police boxed in the Corvette and

approached it with the intent to search it; and that the request for the defendant's license and registration was pretextual.

The memorandum of decision of the trial court, which was filed on June 1, 1983, analyzed the search and seizure here under the then familiar principles of *Spinelli* v. *United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), and *Aguilar* v. *Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). Those principles had been understood to require a reviewing court to gauge the reliability of information given by an informant according to a two-pronged test analyzing (1) the basis of the informant's knowledge—the means by which he acquired his information, and (2) the underlying facts establishing either his general veracity or his reliability in the particular case. See *Illinois* v. *Gates*, U.S. , 103 S. Ct. 2317, 2327, 76 L. Ed. 2d 527 (1983). Beginning with this analysis, which was the proper starting point at that time, the court concluded that the informant's tip was unreliable and "therefore [was] to be treated as if it never existed," and further concluded that the seizure was without probable cause. The court granted the motion to suppress the items seized from the Corvette, namely the amber bottle and its contents, the spoon, the overnight bag and its contents, and the paper bag and its contents.

On June 8, 1983, the United States Supreme Court decided *Illinois* v. *Gates*, supra, in which it abandoned the *Aguilar-Spinelli* test in favor of a determination of probable cause based on the totality of the circumstances.[4] Both parties to this appeal agree, as do we, that the test of *Illinois* v. *Gates*, supra, must be applied to the facts of this case.

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The court found that the defendant was "seized," in constitutional parlance, when the officers boxed in the Corvette with their vehicles and approached it with the intent to search. A person is seized when, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *State* v. *Ostroski,* 186 Conn. 287, 291–92, 440 A.2d 984, cert. denied, 459 U.S. 878, 103 S. Ct. 173, 74 L. Ed. 2d 142 (1982), quoting *United States* v. *Mendenhall,* 446 U.S. 544, 553–54, 100 S. Ct. 1870, 64 L. Ed. 2d 497, reh. denied, 448 U.S. 908, 100 S. Ct. 3051, 65 L. Ed. 2d 1138 (1980); *Florida* v. *Royer,* 460 U.S. 501–502, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). "Whether there has been such a seizure in an individual case is a question of fact." *State* v. *Ostroski,* supra, 292. "[S]topping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the fourth and fourteenth] Amendments, even though the purpose of the stop is limited and the resulting deten-

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It is true that under some circumstances a seizure of an automobile and its occupants may permissibly take place on less than probable cause, such as when there is an investigative stop based on reasonable and articulable suspicion. See, e.g., *Delaware* v. *Prouse,* supra; *State* v. *Januszewski,* 182 Conn. 142, 438 A.2d 679 (1980), cert. denied, 453 U.S. 922, 101 S. Ct. 3159, 69 L. Ed. 2d 1005 (1981). It is also true that, ordinarily, the test for determining whether such a seizure should be measured by probable cause or by the less exacting standard of reasonable suspicion is objective, not subjective. See *State* v. *Januszewski,* supra. That is, the court should, in evaluating a search and seizure, look not to the subjective state of mind of the officer performing the search and seizure but to whether "the circumstances, viewed objectively, justify that action." *Scott* v. *United States,* 436 U.S. 128, 138, 98 S. Ct. 1717, 56 L. Ed. 2d 168 (1978); *United States* v. *Robinson,* 414 U.S. 218, 236, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973); 1 LaFave, Search and Seizure § 3.2 (b).

Here, however, the state did not seek in the trial court to justify this warrantless seizure on the basis that, objectively viewed, it was an investigative stop to be measured by reasonable and articulable suspicion. It did not claim reliance on either the applicability of an objective standard or the existence of facts meeting that standard. Instead, it sought to persuade the court that probable cause existed. Similarly, in this court, both its brief and its oral argument were based on the proposition that the activity of the police constituted a full-scale fourth amendment seizure requir-

ing probable cause. It was not until our original decision was released that the state, by a motion for reargument, for the first time, raised the claim that we review the seizure by the standard of reasonable and articulable suspicion.[5]

For several reasons, we decline to disturb our original decision and to reanalyze the case on the basis of the state's belated claim. First, the state did not follow the mandate of Practice Book § 285A to state this claim of law distinctly to the trial court. Thus, the trial court was not alerted to the opportunity to make additional factual findings which might have been relevant to the claim, and we were thus deprived of those findings and of a reasoned analysis of them by the trial court. See *Barrett* v. *Central Vermont Railway, Inc.*, 2 Conn. App. 530, 537, 480 A.2d 589 (1984). Second, the state did not follow the mandate of Practice Book § 3012, that this issue on appeal be indicated in its preliminary statement of issues, or of Practice Book § 3060F, that its brief concisely set forth this issue. See *Zoning Board of Appeals* v. *Bemis*, 2 Conn. App. 278, 477 A.2d 170 (1984). Third, whether there was, in any given set of circumstances, a reasonable and articulable suspicion is in the first instance a question of fact for the trial court; see *State* v. *Ostroski*, 186 Conn. 287, 292, 440 A.2d 984, cert. denied, 459 U.S. 878, 103 S. Ct. 173, 74 L. Ed. 2d 142 (1982); subject ordinarily to a limited scope of appellate review. *State* v. *Zindros*, 189 Conn. 228, 456 A.2d 288 (1983), cert. denied, U.S. , 104 S. Ct. 1014, 79 L. Ed. 2d 244 (1984).

[5] We granted the motion for reargument in part and ordered that supplemental briefs be filed. On November 19, 1984, without the necessity of further oral argument, we decided the motion, affirming our initial finding of no error and indicating that we would at a later date issue this revised opinion effective November 19, 1984. See *Wrinn* v. *Dunleavy*, 186 Conn. 125, 126, 440 A.2d 261 (1982).

Thus, it is particularly inappropriate for us to make such a determination after full briefing and argument which ignored that issue.

The rule that claims on appeal should first be made at trial " 'applies to criminal as well as civil cases.' " *State* v. *Johnson,* 166 Conn. 439, 445, 352 A.2d 294 (1974). That rule applies to the state as well as to the defendant. We therefore decide this case on the theory on which it was tried and decided in the trial court, and briefed and argued in this court. *Beckenstein* v. *Potter & Carrier, Inc.,* 191 Conn. 120, 132, 464 A.2d 6 (1983). That theory is that the seizure must have been based on probable cause in order to be valid.

Although *Illinois* v. *Gates,* supra, involved a search and seizure pursuant to a warrant, as did *Aguilar* and *Spinelli,* the same standards of probable cause apply to a warrantless search and seizure. See, e.g., *United States* v. *Smith,* 598 F.2d 936, 937 n.2 (5th Cir. 1979).[6] Probable cause deals " 'with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Illinois* v. *Gates,* supra, 2328. "Probable cause means more than mere suspicion. There must be facts and circumstances within the officer's knowledge, and of which he has trustworthy information, sufficient to justify the belief of a reasonable person that an offense has been or is being committed. . . . There is often a fine line between mere suspicion and probable cause, and '[t]hat

[6] Of course, where the search and seizure are pursuant to a warrant, a more "deferential standard of review is appropriate to further the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." *Massachusetts* v. *Upton,* U.S. , 104 S. Ct. 2085, 2088, 80 L. Ed. 2d 721 (1984); see also *State* v. *Zindros,* 189 Conn. 228, 253–54, 456 A.2d 288 (1983), cert. denied, U.S. , 104 S. Ct. 1014, 79 L. Ed. 2d 244 (1984).

line necessarily must be drawn by an act of judgment formed in the light of the particular situation and with account taken of all the circumstances.' " *State* v. *Penland,* 174 Conn. 153, 155–56, 384 A.2d 356, cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978). In the context of a search, there must be probable cause to believe that the material to be seized is connected with criminal activity or will assist in a particular apprehension or conviction, and that the material will be found in the place to be searched. *State* v. *DeChamplain,* 179 Conn. 522, 528–29, 427 A.2d 1338 (1980). Of particular significance here is the reminder of the United States Supreme Court: " 'The process [of determining probable cause] does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Illinois* v. *Gates,* supra, 2328, quoting *United States* v. *Cortez,* 449 U.S. 411, 418, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981).

Applying this test to the seizure which occurred here, we conclude that it was based on less than probable cause. While the informant's tip was a permissible starting point, it lacks sufficient detail and it was not followed by sufficient corroborative behavior to raise the totality of the circumstances from the level of suspicion to the level of probable cause. Cf. *Illinois* v. *Gates,* supra.

The state seeks to support this search by pointing to certain circumstances concerning which Merullo testified, but which the court did not find as facts. This evidence is that Cristello was known as a narcotics user

and dealer; that the police were aware of ongoing drug activity at the cafe; that drug transactions commonly take place in the area of bars and nightclubs; that the dark tinted windows of the Corvette are the type often used in drug transactions; and that the area to which the Corvette was moved was secluded. We need not decide whether this evidence, if credited by the trial court, taken together with the other facts which the court did find, would have supplied a sufficient underpinning for this search. Suffice it to say that the court issued a factually detailed memorandum of decision which did not refer to this evidence. When the court rules on a motion to suppress without detailing the facts supporting its decision, an appellate court may look to the evidence produced in support of the ruling. See, e.g., *State* v. *Jones,* 193 Conn. 70, 475 A.2d 1087 (1984). But where, as here, the trial court performs its judicial function conscientiously by detailing the facts which the state has established, we are not free to add facts which are not found and which are not undisputed. See *State* v. *Perez,* 181 Conn. 299, 302–303, 435 A.2d 334 (1980). We thus address this search shorn of those "facts" which the state seeks to add.

The state concedes in its brief that the arrival of the Corvette at the predicted time and place was insufficient to establish probable cause. It argues, however, that what took place thereafter supplied sufficient corroboration of the tip to establish probable cause under *Illinois* v. *Gates,* supra. We disagree.

We note that although *Gates* abandoned the rigid *Aguilar-Spinelli* test to be applied to informer's tips, it specifically retained the process of examining, in the context of the totality of the circumstances, the "informant's 'veracity,' 'reliability' and 'basis of knowledge' [as] all highly relevant in determining the value of his report." Id., 2327. We note also that *Gates* focused its analysis on three basic types of informer's tips: those

from a particular informant known for the reliability of his predictions of certain types of criminality in a certain area; those from an unquestionably honest citizen who comes forward with a report of criminal activity, which if fabricated would subject him to criminal liability; and those from an informant who, although his motives may be open to question, supplies an explicit and detailed description of alleged wrongdoing, along with an indication that the event was observed first-hand, thus entitling the tip to greater weight than might otherwise be the case. Id., 2329–30.

It is this third type which provides the starting point of our analysis in this case; for, under *Gates,* where the tip involves a prediction of future activity, it is not necessary that the tipster himself indicate a basis of first-hand knowledge, as long as the detail of the tip indicates a "fair probability" that the information came from the target of the tip or from someone whom the target trusted, and as long as that probability was provided by corroboration of the "major portions" of the tipster's predictions. Id., 2336.

Here, the amount of the detail in the tip, which Merullo's investigation corroborated, was moderate, to say the most. It amounted to the color and make of an automobile with out-of-state plates, and the estimated time and place of its arrival. Compare, e.g., the amount of detail supplied by the anonymous letter-writer in *Illinois* v. *Gates,* supra; and the amount of detail supplied by the known informant in *Draper* v. *United States,* 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959), described by the court in *Gates* as "the classic case on the value of corroborative efforts of police officials." Id., 2334. What followed the defendant's arrival at the cafe at the generally predicted time and in a vehicle which fit the general description given in the tip was that the defendant left the vehicle with one person, returned with another who had an eight year old

drug conviction, and moved the vehicle from an illuminated area to an unilluminated area. While this activity may well have given Merullo reasonable and articulable suspicion that the predicted drug sale was taking place, and while this is a close case, we cannot say that the amount of the detail originally supplied was enough, and that it was sufficiently corroborated by further detail, so as to establish a fair probability that the anonymous tipster here had obtained his information either from the defendant or from someone whom the defendant trusted. Cf. *Illinois* v. *Gates,* supra; *Massachusetts* v. *Upton,* supra. We are mindful that " '[b]ecause an informant is right about some things, he is more probably right about other facts . . . .' " *Illinois* v. *Gates,* supra, 2335, quoting *United States* v. *Spinelli,* supra, 427. Unlike *Gates,* however, in which the anonymous letter "contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted"; *Illinois* v. *Gates,* supra, 2335; the nature of the tip and its corroboration here were insufficient to afford " 'a substantial basis for crediting the' " tip. Id. Thus, we conclude that the search was based on less than probable cause.

There is no error.

In this opinion the other judges concurred.